MEMORANDUM OF LAW

DATE: October 10, 1991

TO: Larry Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Pre-Existing Conditions

In a memorandum dated September 25, 1991, you have requested clarification of the definition of a pre-existing condition pursuant to San Diego Municipal Code ("SDMC") section 24.1120 as discussed in a Memorandum of Law dated August 7, 1991, on the same subject. You have indicated that in response to the August 7, 1991 Memorandum of Law referenced above, staff has used a narrow definition of pre-existing condition. Under staff's interpretation, a pre-existing condition is an injury which occurred prior to the dates shown in the Memorandum of Law and while the applicant for disability retirement was in City employment. If these conditions were met, staff would not process the application because the injury arose from a pre-existing condition. If, however, the applicant's injuries occurred prior to the dates identified in the August 7, 1991 Memorandum of Law and also prior to City employment staff would process the disability application. In support of this approach you indicate that the applicant presumably passed a pre-employment physical and was therefore accepted with whatever conditions existed at that time. As examples, you point to congenital heart conditions or the exacerbation of an orthopaedic injury that occurred prior to employment.

Please be advised that staff's admittedly narrow interpretation of the definition of pre-existing condition cannot be supported factually or legally. Factually, pre-employment physicals are not required for all members of the City Employees' Retirement System ("CERS"). Neither pre-employment physicals nor health questionnaires are required for unclassified members of CERS. In addition, the fact that an applicant was or was not a City employee or a member of CERS after September 3, 1982, does not alter the applicability of the pre-existing condition exclusion set forth in SDMC section 24.1120.

Importantly, the City of San Diego, a charter city, has adopted a standard for industrial disability retirements which expressly excludes pre-existing conditions as a basis for the award of this benefit. The practical and legal effect of this action is significant. By expressly excluding pre-existing conditions as a basis for the award of an industrial disability retirement, CERS has effectively negated the

proposition that an employer takes the employee as he finds him as suggested above. A more detailed analysis including your specific questions and our responses follows:

Question No. l: What should we use as a definition of pre-existing condition?

Answer: SDMC section 24.1120 sets forth the requirements for an industrial disability retirement for those persons hired on or after September 3, 1982. It provides in pertinent part:

> (a) Any Member, as defined in section 24.0103(e), permanently incapacitated from the performance of duty as the result of physical injury or disease arising out of or in the course of his or her employment; and
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> (1) not arising from a preexisting medical condition, or
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> (2) not arising from a nervous or mental disorder, irrespective of claimed causative factors, shall be retired for disability with retirement allowance, regardless of age or amount of service.

For purposes of SDMC section 24.1120, a pre-existing condition is any condition which occurs before the operative dates set forth in the August 7, 1991, Memorandum of Law. With respect to general members, the operative dates are June 15, 1989, for industrial disability retirements and July 1, 1989, for non-industrial disability retirements. With respect to safety members, the operative dates are October 11, 1985, for industrial disability retirements and January 1, 1988, for non-industrial disability retirements. The fact that the applicant was or was not in City employ when the alleged pre-existing condition arose does not affect the applicant's entitlement to a disability retirement as long as all other relevant criteria have been satisfied. As such, any interpretation of a pre-existing condition which would allow applications with "pre-existing" conditions arising outside of City employment regardless of the date of origin while rejecting those applications based on pre-existing conditions arising while in City employment but before the operative dates of the disability benefit cannot stand. As stated earlier, this admittedly narrow definition cannot be supported either factually or legally.

While it is generally true that in both workers' compensation and employment disability retirement law an employer takes the employee as he finds him (Kuntz v. Kern County Employees' Retirement Assn., 64 Cal. App. 3d 414 421 (1976)) this broad statement has no mandatory effect on a charter city such as San Diego which has expressly excluded pre-existing conditions as a basis for industrial disability benefits. As a charter city, the City of San Diego is constitutionally empowered to make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by its city

charter, conflicting provisions in the federal or state constitution or preemptive state law. Grimm v. City of San Diego, 94 Cal. App. 3d 33, 37 (1979). "Article XI, section 5, subdivision (b) of the California Constitution (gives) full power to charter cities to provide for the compensation of their employees. It is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution." (Citations omitted.) Id. Consequently, "[a] city council's decision regarding a pension system must be upheld unless expressly prohibited by the city charter." Id. at 38.

Section 141 of the City Charter provides that "[t]he council of the City is hereby authorized and empowered by ordinance to establish a retirement system . . . ." It also provides in pertinent part that:

> The Council may also in said ordinance provide:
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> (a) For the retirement with benefits of an employee who has become physically or mentally disabled by reason of bodily injuries received in or by reason of sickness caused by the discharge of duty or as a result thereof to such an extent as to render necessary retirement from active service.

SDMC section 24.1120 was added to Division 11 (Pension Act of 1981) on September 30, 1985, by 0-16510 N.S. It became effective on October 11, 1985. Unlike its counterparts in the Public Employees' Retirement System (Government Code section 21020), 1937 Act County Retirement Systems (Government Code section 31720) or various other charter provisions with accompanying municipal or county code provisions, SDMC section 24.1120 expressly excludes pre-existing conditions and nervous or mental disorders. Moreover, as set forth above, the City of San Diego as a charter city had the power to promulgate SDMC section 24.1120 including the express exclusions for pre-existing conditions and nervous or mental disorders. Consequently, the City of San Diego has eliminated pre-existing conditions and nervous or mental disorders as injuries necessitating an award of a disability retirement. Practically speaking, this express exclusion of pre-existing conditions has negated the proposition that an employer takes his employee as he finds him. While this proposition may still apply with respect to Workers' Compensation or Long Term Disability claims, it does not have any effect on industrial disability retirements. CERS does not take its members as it finds them. Disabling injuries arising out of pre-existing conditions cannot support the award of industrial disability retirements. With respect to the issue of aggravation or exacerbation of pre-existing conditions, it follows that if the initial pre-existing condition is expressly excluded so too are any aggravations or exacerbations of the earlier injury if they arose out of the pre-existing condition.

Question No. 2: Should the application of the definition be applied retroactively? In other words, we have

granted disability retirements to individuals based upon conditions which came into being prior to their City employment. Assuming that we would consider those to be pre-existing, should we make any re-evaluation of current disabilities?

Answer: Yes.

Please contact me if you have any questions or if you need any additional assistance.

JOHN W. WITT, City Attorney
By
Loraine L. Etherington
Deputy City Attorney

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